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In The

Supreme Court of the United States

UNITED STATES OF AMERICA AND
UNITED STATES DEPARTMENT OF AGRICULTURE,

Petitioners,

v.

UNITED FOODS, INC.,

Respondent.

**On Writ Of Certiorari
From The United States Court Of Appeals
For The Sixth Circuit**

BRIEF OF *AMICI CURIAE* STATES OF CALIFORNIA, COLORADO, DELAWARE, MICHIGAN, NEBRASKA, NEVADA, OHIO, PENNSYLVANIA, AND WASHINGTON IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI

The States of California, Colorado, and Ohio, through their Attorneys General, submit this *amicus curiae* brief in support of petitioner Secretary of Agriculture. The court below invalidated a federal statute that relies on mandatory assessments on the sale of mushrooms to carry out a program for the support of markets for mushrooms through promotion, research, and consumer information programs.[1] It distinguished this Court's jurisprudence upholding such programs on the basis that the mushroom program here is not embedded in a comprehensive program of non-speech regulations, including quantity and price controls. *Amici* have vital interests in this matter because they have analogous programs that rely on assessments imposed upon the sale of agricultural commodities to pay for generic commodity promotion, yet do not broadly collectivize marketing.

Through their comprehensive oversight of agricultural commodities, the *amici* states are particularly well situated to address those interests. This brief is therefore devoted primarily to a discussion of the fundamental economic regulatory role played by such programs.

SUMMARY OF ARGUMENT

1. The Sixth Circuit erred in holding that requiring a grower to help fund a commodity promotional program

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[1] Mushroom Promotion, Research and Consumer Information Act, 7 U.S.C. §§ 6101-6110. *See* § 6101(b).

violates the First Amendment unless the program also restricts other aspects of marketing, notably through price and quantity controls. Whether or not non-speech-related restraints are imposed *in addition* to the requirement to pay for speech-related services should not affect the First Amendment analysis. For nearly 50 years this Court has approved agency shop legislation, where the only requirement is to pay a union for speech services in the form of collective bargaining.

2. Government programs to stabilize farm income began early in the last century, because agriculture is inherently subject to economic instabilities. Agricultural products are homogeneous, perishable, and seasonal; demand is generally inelastic; production responds slowly to change in demand; and producer distribution is atomistic, *i.e.* distributed among many small producers. Programs that enhance demand through promotion and consumer information are now preferred to historical tools of creating artificial scarcity and prices, as well as using tax dollars to support farm prices. The importance of promotional programs has increased enormously with the globalization of the agricultural economy, coupled with the nation's mid-1990's entry into trade treaties that eviscerate the utility of quantity controls by prohibiting import restrictions and that also prohibit subsidies.

ARGUMENT

A. WHETHER PROMOTIONAL REGULATIONS WARRANT REVIEW AS ECONOMIC REGULATION, AS OPPOSED TO HEIGHTENED FIRST AMENDMENT SCRUTINY, TURNS ON WHETHER THEY DIRECTLY SERVE AN ECONOMIC REGULATORY PURPOSE, NOT ON WHETHER THEY ARE EMBEDDED IN OTHER ECONOMIC REGULATION.

The court below misinterpreted this Court's opinion in *Glickman v. Wileman Bros.*,[1] which exempted collective advertising assessments from heightened First Amendment scrutiny. It misread the holding as limited to the context where the advertising is embedded in a program that broadly curtails a producer's freedom to market and contains price and quantity controls.

While it is true that the *Wileman Bros.* opinion "stress[ed] the importance of [the] context" in which the promotional regulations were found, namely, a program that displaced "many aspects of independent business activity,"[2] it did so to emphasize the economic character of the promotion. The Court held that the promotional regulations "should [not] be scrutinized under a different standard than that applicable to the other anticompetitive features of the marketing order."[3] The broad nature of the

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[1] 521 U.S. 457 (1997).

[2] *Id.* at 469.

[3] *Ibid.* Thus, "no greater weight should be given to the fact that some producers do not wish to foster generic advertising than to the fact that many of them may well object to the marketing orders themselves because they might earn more money in an unregulated market." *Id.* at 474.

holding is highlighted by the first words of the principal dissent: "The Court today finds no First Amendment right to be free of coerced subsidization of commercial speech. . . . "[4]

The appellate court misconstrued the "germaneness" prong of the test that *Wileman Bros.* applied, the traditional test taken from this Court's review of First Amendment challenges to agency shop and integrated bar regulation.[5] It reasoned that generic advertising is not "germane" within the meaning of *Wileman Bros.* unless it is germane "to a valid, comprehensive, regulatory scheme." The reasoning is faulty, because the benchmark for germaneness in the applicable test is not other regulatory *provisions*, but "the *purpose* for which the compelled association was justified."[6] *Wileman Bros.* concludes that "generic advertising of California peaches and nectarines is unquestionably germane to the purposes of the marketing orders,"[7] which is to "maintain such orderly marketing conditions for agricultural commodities" as "will establish . . . parity prices" for farmers.[8] Since the purposes of the Mushroom Promotion and Research Act

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[4] *Id.* at 478.

[5] The Court's discussion relied primarily on *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977) [agency shop], *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990) [integrated bar], and *Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507 (1991) [agency shop].

[6] *Wileman Bros.*, 521 U.S. at 473, emphasis added, citing *Keller*, 496 U.S. at 13.

[7] *Ibid.*

[8] 7 U.S.C. § 602(1).

include "maintain[ing] and expand[ing] existing markets," generic advertising is "unquestionably germane to [those] purposes. . . . "[9]

The correct focus of germaneness analysis is further clarified by a functional alternative to the "germaneness" touchstone that was recommended by four justices in *Lehnert* as "more administrable,"[10] expressed there as it relates to agency shop review:

> Our First Amendment jurisprudence therefore recognizes a correlation between the rights and the duties of the union, on the one hand, and the nonunion members of the bargaining unit, on the other. Where the state imposes upon the union a duty to deliver services, it may permit the union to demand reimbursement for them; or, looked at from the other end, where the state creates in the nonmembers a legal entitlement from the union, it may compel them to pay the cost.[11]

The fact that the dissenter may not even want the service makes no difference. Some employees, for example, may think that they could negotiate a better employment contract for themselves than the union achieves for the rank and file and may therefore feel that the union contract works them a *disservice*. Yet for almost 50 years, since

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[9] *Wileman Bros.*, 521 U.S. at 473.

[10] *Lehnert*, 500 U.S. at 551.

[11] *Id.* at 556 (concurring and dissenting opinion by Justice Scalia).

Railway Employees' Department v. Hanson,[12] this Court has approved the "stand-alone" requirement to pay for speech services in the form of collective bargaining.

The circuit court's misreading of the germaneness/corresponding-obligation prong carried over into its treatment of the historical "free rider" rationale for compelling contribution.[13] Since the court viewed price and quantity controls – which it mistakenly believed to be in the marketing order *Wileman Bros.* reviewed[14] – as the sole grower benefits, it judged these to be the only program features raising the free rider issue.[15]

The correct analysis is that the advertising is a service that the law requires the Secretary to perform and for which payment can accordingly be compelled in order to distribute the cost fairly.

There is no basis in free speech/free association analysis to hold that "less is more," namely, that any potential

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[12] 351 U.S. 225 (1956); *Machinists v. Street*, 367 U.S. 740 (1961); *Abood v. Detroit Board of Education, supra*, 431 U.S. 209; *Ellis v. Railway Clerks*, 466 U.S. 435 (1983); *Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507 (1991).

[13] *See Lehnert*, 500 U.S. at 519.

[14] The order, codified at 7 C.F.R. Part 917 (1989), includes authority for paid advertising and for production and marketing research, *id.* at § 917.39, daily shipping report requirements, *id.* at § 917.177, maturity standards, *id.* at § 917.460, size and packing standards, *id.* at § 917.454, and authority to levy assessments to pay for all of the programs, *id.* at § 917.37.

[15] *United Foods v. United States of America; United States Department of Agriculture*, 197 F.3d 221, 224 (6th Cir. 1999).

burden on free speech/free association interests is somehow weightier where not accompanied by non-speech-related regulatory burdens. Moreover, such a test invites the potential mischief of a legislature's adding possibly unnecessary non-speech regulation solely to constitutionally qualify the compelled payment.

B. STABILIZING FARM PRICES HAS BEEN THE CONSISTENT ECONOMIC PURPOSE OF GOVERNMENTAL INTERVENTION, BUT THE MEANS HAVE CHANGED FROM CREATING SCARCITY TO EXPANDING MARKETS.

Because the agricultural market is naturally subject to a number of destabilizing factors, governmental intervention to stabilize farm income through the ups and downs has employed different tools, which have evolved over time. Collective promotion has become the most favored and the one most adapted to today's globalized agricultural market.

1. The agricultural market is subject to destabilizing factors which government intervention has sought to address.

(a) Variable supply and inelastic demand.

Agriculture is subject to uncontrollable as well as unpredictable natural forces that greatly affect crop size.[16] At the same time, the demand for agricultural

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[16] Rusek, Christopher, *Trade Liberalization in Developed Countries: Movement Toward Market Control of Agricultural Trade*

commodities is generally inelastic, *i.e.*, prices are very responsive to changes in availability of the product, so that a one percent increase in quantity can result in more than a one percent decrease in price.[17] Thus, the industry must deal with cycles of overproduction and low prices followed by short supplies and high prices.[18]

(b) Seasonality and perishability.

Because farm products are mature and ready for market during a limited time span, and because much produce is highly perishable, producers are put in a weak bargaining position. As this Court has noted, "[a] large portion of an entire year's labor devoted to the production of a crop could be lost if the farmer were forced to

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in the United States, Japan, and the European Union, 48 Admin. L. Rev. 493, 497 (1996).

[17] *See, e.g.*, Scott, Robert, *Exported to Death: The Failure of Agricultural Deregulation*, 9 Minn. J. Global Trade 87, 102 at n.13 (2000); Purnell, David R., *A Critical Examination of the Target Export Assistance Program, Its Transformation into the Market Promotion Program and Its Future*, 18 N.C. J. Int'l L. & Comm. Reg. 551 at n.139 (1993) ["The natural instability of agricultural markets due to inelastic demand and fluctuating supplies dictated by the vagaries of nature on which agricultural production depends so completely, promotes significant swings in the price of agricultural commodities on world markets."]; Chen, Jim, *The American Ideology*, 48 Van. L. Rev. 809, 857 (1995) ["Increased supply suppresses the price of any given agricultural commodity. And falling prices do not increase total demand by price-inelastic food consumers."].

[18] Rusek, *supra*, 48 Admin. L. Rev, op. cit.

bring his harvest to market at an unfavorable time."[19] "Historically, perishability of produce forced the farmer to take whatever price he could obtain at the time of the harvest. . . . Even in a reasonably competitive market, physical inability to withhold produce will place a producer at a disadvantage."[20]

(c) Lagged production and limited mobility of resources.

Producers of perennial crops face problems of long planning horizons, long lags between initial planting and production,[21] essentially fixed assets, and large capital requirements. These factors are conducive to maintaining excess capacity, which, of course, results in a lowering of prices.[22] There is a tendency to overinvest when prices are favorable. Then, when prices drop, adjustments are both difficult and slow because of the specialized nature

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[19] *National Broiler Marketing Assn. v. United States*, 436 U.S. 816, 825 (1977).

[20] *Id.* at 840 (White, J., dissenting).

[21] For example, it takes 5 to 8 years to bring tree crops into production. California Agricultural Statistics Service, *California Fruit & Nut Acreage* (1992).

[22] *See* Lauck, Jon, *After Deregulation: Constructing Agricultural Policy in the Age of "Freedom to Farm,"* 5 Drake J. Agric. L. 3, 5 (2000) ["Instead of adjusting supply when prices sink to unsustainable levels, farmers often maintain production levels – believing that they need to operate at full-capacity in order to make up for lower prices – or increase their production."].

of production resources.[23] The problem of sustained low incomes due to limited mobility of resources out of commitment to a particular crop is referred to as "the farm problem."[24]

(d) Many Small Producers and Homogeneous Products.

"[A]griculture is made up of a large number of widely dispersed, atomistic producers with no one producer of sufficient size to significantly affect markets."[25] The U.S. Department of Agriculture estimates the country's farm sector is made up of 2,187,000 farms and ranches.[26] Because market power is diluted among so

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[23] *Ibid.* ["Unlike other industries, where firms and their productive capacity exit the market when prices decline, farms continue to produce commodities, further depressing prices"; fn deleted].

[24] Gardner, B.L., *Changing Economic Perspectives on the Farm Problem,* 30 Journal of Economic Literature 62-101 (1990).

[25] Looney, J.W., *The Changing Focus of Government Regulation of Agriculture in the United States,* 44 Mercer L. Rev. 763, 767 (1993). *See also* Davidson, Kenneth M., *Symposium: 1982 Merger Guidelines: The Competitive Significance of Segmented Markets,* 71 Calif. L. Rev. 445, 451, n.32 (1983) ["Agriculture is an atomistic homogeneous product market. It is periodically subject to both natural disasters and economic distress from overproduction."].

[26] U.S. Department of Agriculture, Economic Research Service, *Agricultural Income and Finance Situation and Outlook,* <http://usda.mannlib.cornell.edu/reports/errsor/economics/ais-bb/2000/agricultural income and finance 12.18.98> (October, 2000).

many individual producers, producers have always considered themselves to be price takers rather than price makers.[27] A factor further undercutting an individual producer's ability to create a market is that, unlike most manufactured products, the product of one agricultural producer is not readily distinguishable from that of another producer.

> In the vast sea of farms, all producing fungible commodities, no farmer can demand a price higher than the prevailing market rate. Nor can any one farmer, acting alone, affect price merely by manipulating output.[28]

"Due to this atomistic nature of agricultural production," government regulation of agriculture has been designed to protect the individual farm from market instability, with "boom-bust pricing cycles."[29]

2. Government programs to stabilize farm prices through quantity control and price subsidies have fallen out of favor.

Price regulation can be effectuated by manipulating either demand or supply. Whereas collective advertising programs address the demand side of the equation, early

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[27] Forker, Olan, & Ronald Ward, *Commodity Advertising*, Lexington Books (1993) at 7. ["Since the producers are small in size and large in number relative to the purchasers of their production they have considered themselves 'price takers' with little influence over the price or form of their products when marketed."] *See also* Rusek, *supra, ibid.*

[28] Chen, Jim, *supra*, 48 Van. L. Rev. at 853.

[29] Looney, *supra*, 44 Mercer L. Rev. at 767.

congressional efforts to stabilize farm prices focused on limiting supply, *i.e.*, they sought to raise prices by creating artificial scarcity. The Agricultural Adjustment Act of 1933 responded to the farm emergency created by the Great Depression by taxing farm commodities and using the proceeds to encourage decreases in production.[30] 1937 saw the arrival of the Agricultural Marketing Agreement Act, which authorized control of quantity in order to maintain prices.[31] The following year, Congress enacted the Agricultural Adjustment Act of 1938, which attempted "to control the volume moving in interstate and foreign commerce in order to avoid surpluses and shortages and the consequent abnormally low or high wheat prices."[32]

Supply restrictions have fallen into disfavor. Thus, in 1996, when Congress passed what has been called "freedom to farm" legislation[33] as part of an agenda to roll back the New Deal, the Chairman of the Senate Agriculture Committee opened the final discussion by recounting that the "supply and control" dictates of the New Deal had required his father to destroy part of his corn crop and some of his hogs.[34] This 1996 legislation not

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[30] Ch. 25, 48 Stat. 31 (1933) (current version at 7 U.S.C. §§ 601-626.) *See United States v. Butler*, 297 U.S. 1, 67 (1936). *See also* Looney, *supra*, at 765.

[31] Ch. 296, 50 Stat. 246 (1937).

[32] *Wickard v. Filburn*, 317 U.S. 111, 115 (1942); Pub.L. No. 75-430, ch. 30, 52 Stat. 31 (1938).

[33] Federal Agricultural Improvement and Reform Act of 1996, Pub.L. No. 104-127, 171, 110 Stat. 888, 937-38; codified in scattered sections of Title 7 of U.S.C.

[34] Lauck, Jon, *supra*, 5 Drake J. Agric.L. at 4.

only represents Congressional preference against government intrusion in markets, but is specifically linked to greater efforts to promote free trade and agricultural exports.[35]

In addition to manipulation of supply, another historical tool for stabilizing farm income has involved large scale government payments to farmers to support prices.[36] In 1992, for example, seventy-five percent or more of the nation's wheat, cotton, rice, and feed grain acreage was enrolled in a price support program.[37] These programs have been criticized on a number of bases,[38] including the complexity of the rules and the cost to the taxpayer.[39] Complexity not only frustrates participants,

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[35] Lauck, Jon, *Against the Grain: The North Dakota Wheat Pooling Plan and the Liberalization Trend in World Agricultural Markets*, 8 Minn. J. Global Trade 289, 322 (1999).

[36] For a discussion of the history of price supports, *see* Rasor, Paul B., & James B. Wadley, *The Secured Farm Creditors Interest In Federal Price Supports: Policies and Priorities*, 73 Ken. L.J. 597 (1985); and Rasmussen, Wayne D., *New Deal Agricultural Policies after Fifty Years*, 68 Minn. L. Rev. 353 (1983).

[37] Malasky, Alan R., Christopher R. Kelley & Susan A. Schneider, *Resolving Federal Farm Program Disputes: Recent Developments*, 19 Wm. Mitchell L. Rev. 283, 285 (1993).

[38] Forker & Ward, *supra*, *Commodity Advertising* at 89; Malasky, *et al.*, *supra*, at 298. A common criticism of the price and income support programs has been that most of the benefits are received by the large producers. Looney, *supra*, n.15, at 790-91.

[39] Kelley, Christopher R., *Rethinking the Equities of Federal Farm Programs*, 14 N. Ill. U. Law Rev. 659, 661-663 (1994).

but conduces to enforcement problems.[40] Taxpayer costs for price supports are heavy. In 1995, for example, payments under commodity programs alone cost about six billion dollars,[41] and half of all federal spending on direct subsidies and programs for all industries went to agriculture.[42]

The 1996 legislation,[43] substituted production flexibility contract payments for price supports, with the purpose to help producers who had become dependent on price supports to make the transition to a market-based economy.[44] The Act also terminated acreage

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[40] *See* Kelley, Christopher R., *Recent Federal Farm Program Developments* 4 Drake J. Agric. L. 93, 122 (1999) ["Even experts have trouble understanding the federal farm program at times. But when white collar criminals get into the act, deliberately making their manipulations as complicated and disguised as possible, it is an even greater challenge to make sense out of what has happened."] *See also Winters Ranch Partnership v. Viadero*, 123 F.3d 327 (5th Cir. 1997), arising out of an investigation into whether participants met eligibility and payment limitation requirements of federal price support programs.

[41] Agricultural Secretary Dan Glickman, Remarks at Agriculture Department Outlook Conference, Fed. News Service, Feb. 21, 1996, available in LEXIS, News Library, Fednew File.

[42] *See* Kelley, Christopher R., *supra*, 4 Drake J. Agric. L. 93, 96, n.18.

[43] Federal Agricultural Improvement and Reform Act of 1996, Pub.L. No. 104-127, 171, 110 Stat. 888, 937-38.

[44] At least until 2002. For a discussion of the program, *see Domestic Commodity Programs*, Chapter 57, 5 *West Federal Administrative Practice* 230 (1999).

reduction programs, and 15 million set aside acres have now been returned to production[45]

3. The commodity marketing programs are now viewed as preferable means for achieving farm income stability.

As both quantity controls and heavy taxpayer support for farmers have become less favored, generic promotion and advertising for agricultural commodities have come into prominence as a way of approaching the supply-demand problem from the other side, namely, by increasing demand, and with very small costs to government.[46]

> "Generic advertising is the cooperative effort among producers of a nearly homogeneous product to disseminate information about the underlying attributes of the product to existing and potential consumers for the purpose of strengthening demand for the commodity."[47]

Through these programs, producers have been able to put together enough money to "operate rather large information programs to inform consumers of the attributes of their commodity. . . . "[48] By the mid-1980s, there was general acceptance of funding these programs through

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[45] *See* McNiel, Dale E., *Furthering the Reforms of Agricultural Policies in the Millenium Round*, 9 Minn. J. Global Trade 41 (2000).

[46] *See, e.g.*, Rausser, Gordon C. and David Nielson, *Looking Ahead: Agricultural Policy in the 1990s*, 23 U.C. Davis L. Rev. 415, 422-427 (1990).

[47] Forker & Ward, *supra*, *Commodity Advertising* at 2.

[48] *Id.* at 10.

mandatory assessments.[49] "Commodity industries recognize the need to advertise their products but also recognize the need for everyone who benefits to pay their share of the program costs."[50] Collective promotion programs have reduced the cost of government price supports,[51] a consequence providing the express reason for establishing at least one such program.[52]

4. The growing importance of the world agricultural market and treaty restrictions on import limitations and price subsidies make promotion the foremost tool to support farm income.

Just as earlier in this century the agricultural economy went from local to interstate in scale,[53] it has now

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[49] Forker & Ward, *supra, Commodity Advertising* at 89.

[50] Forker & Ward, *supra, Commodity Advertising* at 19.

[51] *See* Kinnucan, H.W., & E.T. Belleza, *Price and Quantity Impacts of Canada's Dairy Advertising Programs*, Agricultural and Resource Economics Review, Vol. 24 (1995); *see also* Kinnucan, H.W., P.A.Duffy, & K.Z. Ackerman, *Effects of Price vs. Non-Price Export Promotion; the Case of Cotton*, 17 Review of Agricultural Economics 91-100 (1995).

[52] Senate Report No. 98-163 on Dairy and Tobacco Adjustment Act of 1983, Pub.L. 98-180.1675-1677.0.

[53] Portions of the first Agricultural Adjustment Act of 1933 were declared unconstitutional by this Court in *United States v. Butler*, 297 U.S. at 74, in part because they dealt with what was deemed a "local" matter, i.e., agriculture. When the broader Agricultural Adjustment Act of 1938 was reviewed by this court in *Wickard v. Filburn*, 317 U.S. 111, agriculture had expanded and was deemed an interstate enterprise. *See* Looney, *supra*, 44 Mercer L. Rev. at 765.

become internationalized.[54] Thus, the role of collective promotional efforts by producers becomes more important as markets become more distant and complex and as producers face possible hurdles – in the form of trade barriers – to their access to relevant markets.

The United States is the world's largest agricultural exporting nation.[55] Thirty percent of our agricultural production is exported,[56] and the agriculture sector has consistently been the largest positive contributor to the U.S. balance of trade.[57] The nation's farm productivity has been increasing at a rate of 3 to 4 percent annually, and the growth in foreign markets for those products far exceeds that in the domestic market,[58] in 1996 by a factor of four.[59]

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[54] The internationalization of agriculture is a constant theme in recent law review articles. *See, e.g.*, Centner, Terence J., *The Internationalization of Agriculture: Preparing for the Twenty-First Century*, 73 Neb. L. Rev. 5 (1994).

[55] Purnell, David R., *A Critical Examination of the Target Export Assistance Program, Its Transformation into the Market Promotion Program and Its Future*, 18 N.C. J. Int'l L. & Comm. Reg. 551 at n.71 (1993).

[56] McNiel, Dale E., *Furthering the Reforms of Agricultural Policies in the Millennium Round*, 9 Minn. J. Global Trade 41-42 (2000).

[57] *Ibid.*

[58] *Ibid.*

[59] Parker, James V., *The U.S. Approach to Export Market Development*, in Ferrero, Ackerman, and Nichols, eds., *Agricultural Commodity Promotion Policies and Programs in the Global Agri-Food System, Proceedings from the NEC-63 Conference* 1, 4 (1996).

International free trade agreements and organizations policing them now limit government intervention in agricultural markets. The United States had long urged agricultural reform under the GATT treaty,[60] calling for a phasing out of all government subsidies which either directly or indirectly affect trade.[61] Success came in 1994 with the Uruguay-Round-generated World Trade Organization Agreement on Agriculture, which prohibits or highly restricts subsidies.[62] While the Agreement limits most traditional subsidies to the agricultural sector, it does not limit the extent to which a country can support market development activities.[63] Thus, nations around the world are retooling their export strategies to emphasize GATT-permitted market development and promotion.[64]

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[60] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194; as amended by Uruguay Round Agreements Act, Pub.L. No. 103-465 (1994)

[61] McNiel, *supra*, 9 Minn. J. Global Trade at 52.

[62] Agreement on Agriculture, Articles 4(2), 6, 7, Annex 1A, Agreement Establishing the World Trade Organization, April 15, 1994 (reprinted in H.R. Doc. No. 316, 103 Cong., 2d Sess. 1355 (1994)); *see* 43 U.S.C. § 624(f). *See* Gantz, David A., *A Post-Uruguay Round Introduction to International Trade Law in the United States*, 12 Ariz. J. Int'l & Comp. Law 7 (1995); Figueroa, Miguel A., *The GATT and Agriculture*, 5 Kan. J. of Law and Pub. Pol. 93 (1995).

[63] General Accounting Office, Agricultural Marketing, Comparative Analysis of U.S. and Foreign Promotion and Research Programs, GAO/RCED-95-171 Agricultural Marketing, 1995, at 13.

[64] Parker, James V., *supra*, in *Agricultural Commodity Promotion Policies and Programs in the Global Agri-Food System* at 11. *See also* Ward, Ron, *Commodity Promotions: A Global View, op. cit.* at 15.

California, for example, has marketing programs for over 40 agricultural commodities. Advertising and education account for over 80% of the aggregate budget, and no program has price or quantity controls. Over 35 of these programs are, like the mushroom program under review, "stand alone" promotion/research programs, unaccompanied by non-speech-related restraints.[65]

Notably, any attempt to control prices by placing quantity restrictions on American producers would be defeated by treaty obligations not to restrict imports. Because both the 1994 Agricultural Agreement under GATT and North American Free Trade Agreement[66] limit import restrictions – the latter will essentially eliminate them by the year 2008[67] – any shortfall will simply be filled by imported agricultural products. Thus, this historic form of economic regulation that the circuit court analysis relied on will not be available.

CONCLUSION

Economic regulation to support farm prices can theoretically be approached by limiting quantity, or, obversely, by expanding the market. Expanding the market through promotion is no less economic regulation than

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[65] Marketing is generally constrained by other statutory provisions.

[66] North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 289, 605 (1993) article 703(3), Annex 703.3; *see* NAFTA Implementation Act, 19 U.S.C. §§ 3301-3473 (1993).

[67] *Id.* at ch. 7(A).

regulating the quantity a grower can bring to market. Promotion has come to be more acceptable than quantity limitations, and more acceptable than direct taxpayer support through payments to compensate for price deficiencies. With the greatly increasing importance of the world agricultural market to the American agricultural sector, and with treaty provisions that severely restrain the import restrictions that would be necessary to make quantity limitations effective, and that also severely restrain subsidies, promotional programs are the tool of choice to achieve the regulatory purpose of protecting farm income.

As this Court ruled in *Wileman Bros.*, collective promotional programs for agriculture partake of the nature of economic regulation, and as such are not subject to heightened scrutiny under the First Amendment. Such programs are no less economic regulation because not accompanied by additional, non-speech-related regulation.

Accordingly, the decision below should be reversed.

Respectfully submitted,

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